



INTERIOR BOARD OF INDIAN APPEALS

Estate of Samuel Tsoodle

11 IBIA 163 (04/14/1983)

Reconsideration denied:
11 IBIA 213



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF SAMUEL TSOODLE

IBIA 82-60

Decided April 14, 1983

Appeal from an order denying rehearing issued by Administrative Law Judge Keith L. Burrowes. IP BI 510 B-80.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

2. Indian Probate: Wills: Testamentary Capacity: Generally

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Furthermore, the evidence must show that this condition existed at the time of the execution of the will.

3. Indian Probate: Wills: Undue Influence

When the evidence does not show that influence was exerted on the testator at the time of the execution of the will or that the will was contrary to the testator's wishes, undue influence in the execution of the will cannot be found.

4. Indian Probate: Wills: Undue Influence

Under the circumstances of this case, the written statement of the scrivener of an Indian will concerning whether the testator was acting under undue influence,

made at the time of the execution of the will, shall be given great weight in determining the testator's state of mind.

APPEARANCES: Oliver E. Davis, Esq., Anadarko, Oklahoma, for appellants. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

In a notice of appeal received by the Board of Indian Appeals on September 20, 1982, James O. Tsoodle, Vernon L. Dunlap, Sammy D. Dunlap, Danny J. Dunlap, Delores Davis, and Jeanice Sue (Davis) Lewis (appellants) sought review of a July 23, 1982, order denying petition for rehearing issued by Administrative Law Judge Keith L. Burrowes in the estate of Samuel Tsoodle, deceased Kiowa allottee 1249. The order denying rehearing let stand a March 17, 1982, order approving will and decree of distribution. For the reasons given below, the Board affirms this decision.

Background

Samuel Tsoodle (decedent) was born on April 8, 1898, and died on April 5, 1980. Decedent was married twice and had six children, three of whom died in infancy. Decedent's three remaining children survived him. They are James O. Tsoodle, born May 20, 1919, to decedent and his first wife; Mitchell Tsoodle, born December 20, 1939, and Ruth Ann Tsoodle Otis, born November 25, 1942, both of whom were the children of decedent and his second wife. Decedent was also survived by one stepdaughter, Delores (Tsoodle) Davis, her daughter, Jeanice (Davis) Lewis, and the three children of a deceased stepdaughter (Velma Tsoodle), Vernon L. Dunlap, Sammy D. Dunlap, and Danny J. Dunlap.

In April of 1973, decedent suffered a stroke and was confined until July of 1973 in the hospital and a nursing home. This stroke apparently resulted in some mental and physical impairment. When he left the nursing home he stayed primarily with either his daughter or his son, Mitchell. Because of deterioration in decedent's medical condition, he was again confined to a nursing home in 1979 and was a resident of the nursing home at the time of his death.

On June 5, 1974, decedent executed a will at the Office of the Field Solicitor, U.S. Department of the Interior, Anadarko, Oklahoma. The will was prepared by W. M. Haight, an attorney-advisor in the Office of the Field Solicitor. Haight, who also witnessed the will, predeceased decedent. The second witness to the will, another employee of the Office of the Field Solicitor, did not know decedent and had no specific recollection of this will.

The dispositive provisions of the will left all of decedent's trust property to Ruth Ann Tsoodle Otis and Mitchell Tsoodle. In addition the will states:

SIXTH - I give, devise and bequeath nothing to my son, James O. Tsoodle, for the reason that he has already been provided for.

SEVENTH - I give, devise, and bequeath nothing to my granddaughter, Jeanice Davis; my stepdaughters, Velma Tsoodle and Delores Tsoodle, which are named in a previous will.

An affidavit to accompany Indian will signed by the decedent, the two witnesses, and Haight as the scrivener of the will was also attached to the will.

The will was transmitted to the Superintendent of the Anadarko Agency, Bureau of Indian Affairs, on June 5, 1974. A note written by Haight appears at the bottom of the transmittal memorandum:

Mr. Tsoodle talked rather fast and I was satisfied his chief purpose in making the will was to take his granddaughter and his two stepdaughters from inheriting as he had done in his previous will. He said the granddaughter moved about considerable and was in Oregon at the present time and the two stepdaughters drank and he didn't like their kind of life style and he preferred that only his own children should share in his estate. Since it was not entirely clear as to which piece or pieces of property he wished Ruth and Mitchell to share together and individually, he called in his son, Mitchell, to help explain it. I was confident that Mitchell had nothing to do with influencing the older Mr. Tsoodle in the making of the will. I read it over to him carefully and he said it was precisely the way he wanted it.

The Administrative Law Judge held a hearing in this estate on October 22, 1980. At that hearing Delores Davis indicated that she intended to contest the will on the grounds that it was the result of undue influence exerted on decedent by Mitchell, Ruth, or both of them. A second hearing was therefore held on December 2-3, 1981.

Following these hearings the Administrative Law Judge issued his order approving the will on March 17, 1982. This order found that had decedent died intestate, his heirs under Oklahoma law would have been James L. Tsoodle, Ruth Ann Tsoodle Otis, and Mitchell Tsoodle, each of whom would have received one-third of the estate. Instead, the Administrative Law Judge found that there was no evidence to indicate that decedent was not competent at the time of the execution of the will and that Delores Davis had not sustained her burden of proving undue influence. In this regard, the Administrative Law Judge found that decedent was capable of being influenced and that, from his observation of them, both Mitchell and Ruth were capable of controlling decedent's mind and actions. He could not find, however, that they exerted influence on decedent at the time of the testamentary act or that disposition of his property was in fact contrary to his wishes. Therefore, distribution was ordered in accordance with the provisions of the will.

Appellants sought rehearing of this decision. Rehearing was denied on July 23, 1982, and appellants brought the present appeal.

Discussion and Conclusions

As the Administrative Law Judge implicitly noted, the evidence in this case is conflicting and contradictory. The questions before the Board,

however, as they were before the Administrative Law Judge, are quite narrow: Was Samuel Tsoodle competent to make a will on June 5, 1974, and does that will represent his own desires as to the disposition of his property?

[1] The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will. Estate of Asmakt Yumpquitat (Millie Sampson), 8 IBIA 1 (1980). Appellants introduced evidence tending to show that in the spring of 1973, following decedent's stroke, he had difficulties with his memory and was physically impaired. Further evidence suggested that some amount of physical impairment and perhaps some loss of mental capability remained and that his physical condition in 1979, shortly before his death, was not good. Appellants' evidence is very general and does not specifically relate to decedent's competence on or about June 5, 1974, the date of the execution of his will.

[2] To invalidate a will for lack of testamentary capacity, the evidence must show that the testator did not know the natural objects of his bounty, the extent of his property, or the desired distribution. Mere physical impairment or a decrease in mental capability is not sufficient to support a finding of lack of testamentary capacity. See Estate of Jane Eckiwaudah, a.k.a., Emma Chahsenah, 9 IBIA 112 (1981). Furthermore, the condition must be shown to exist at the time of the execution of the will. Estate of Martha DeRoin, IA-874 (1957).

Appellants do not argue that decedent did not know the natural objects of his bounty or the extent of his property. Instead they cite the fact that decedent requested assistance from his son in explaining the disposition of his property as proof that he did not know how he wished his estate to be distributed. Evidence on the involvement of Mitchell Tsoodle in the preparation of his father's will comes from the statement written by Haight on the memorandum transmitting the will to the Superintendent. It is equally possible to read the statement as saying that decedent requested assistance because he was unable to make the attorney preparing the will understand the intended distribution. The statement is not sufficient to prove that decedent could not remember how he wanted the property distributed.

Therefore, appellants failed to sustain their burden of proving that decedent lacked testamentary capacity at the time of the execution of his will.

[3] In regard to appellants' contention that decedent was acting under undue influence, the Administrative Law Judge found that two of the elements necessary to support a finding of undue influence were present in this case: first, the decedent was susceptible to influence and second, either Ruth or Mitchell was capable of influencing his mind and actions. He also found that the two remaining elements were not present: the testator was not acting under the influence of another at the time of the testamentary act and the disposition was not contrary to his wishes. Each of these four elements must be present to support a finding of undue influence. See Yumpquitat, *supra*; Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12, 82 I.D. 169 (1974).

The Administrative Law Judge relied partially on Haight's note in determining that decedent was not acting under the influence of another at

the time of the execution of the will. This note clearly states that Mitchell Tsoodle was not only present when the will was executed, but actually participated in the drafting. Normally such participation by a beneficiary under the will would be very strong evidence that the testator was not acting under his own volition. See, e.g., Estate of Joseph Caddo a.k.a. James Joseph Caddo and Jim Butler, 7 IBIA 286 (1979); Estate of Julius Benter, 1 IBIA 24 (1970).

[4] In this case, the scrivener of the will, an attorney familiar with preparing Indian wills, felt it was necessary or desirable to record his impressions that decedent was acting under his own volition despite the fact that a beneficiary under the will was present and participated in the drafting of the will. There is no suggestion of any reason why the attorney would not be truthful in this recitation. The statement was made in furtherance of the attorney's official responsibilities and probably partly as a record of present impressions in the event he were later called upon to testify as a witness concerning this will. Considering the attorney's recognition of the importance of this specific question and his attempt to deal directly with it, the Board is inclined to agree with the Administrative Law Judge that this statement should be given great weight in determining the state of mind of the decedent at the time of the execution of his will.

Appellants have presented no evidence either before the Administrative Law Judge or the Board indicating that decedent was not acting under his own volition on June 5, 1974, or that the attorney's statement should be disregarded. In the absence of such proof, the only evidence available is the attorney's statement that decedent was acting under his own volition.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 23, 1982, order denying rehearing is affirmed and the March 17, 1982, order approving will and decree of distribution in the estate of Samuel Tsoodle stands.

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Jerry Muskrat
Administrative Judge

We concur:

//original signed

Wm. Philip Horton
Chief Administrative Judge

//original signed

Franklin D. Arness
Administrative Judge